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1967

# Orville Evershed And Earl Hemmert v. Joy R. Berry And Miriam B. Berry, Mary Ellen Ray Dba Mary Len's Dress Shop And Robert Kump Dba Ray's Barber Shop : Appellant's Brief

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Bruce G. Cohne and Beaslin, Nygaard, Coke & Vincent; Attorneys for Defendant-Appellant Phillip Conley dba the Hickory Pit

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# In the Supreme Court of the State of Utah

WILLIE EVERSHERD and EARL BERRY,  
Plaintiffs,

Plaintiffs and Respondents,

vs.

J. BERRY and MIRIAM S. BERRY,  
RAY ELLEN RAY and  
RAY'S DRESS SHOP and  
RAY'S BARBER SHOP  
Defendants.

and

PHILIP CONLEY dba MICHAEL  
Defendant and Respondent.

## APPELLANT'S PETITION

Appeal from a judgment for plaintiffs

Judicial District Court in and for Salt Lake County

Honorable Stewart M. Hansen, Judge

BEASLIN, NICHOLS  
& VINCENT

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FILED

JUL 3

Clerk, Supreme Court

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# In The Supreme Court of the State of Utah

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ORVILLE EVERSHED and EARL HEM-  
MERT,

Plaintiffs and Respondents,

vs.

JOY R. BERRY and MIRIAM B. BERRY,  
MARY ELLEN RAY dba MARY  
ELLEN'S DRESS SHOP and ROBERT  
KUMP dba RAY'S BARBER SHOP,  
Defendants,

and

PHILLIP CONLEY dba HICKORY PIT,  
Defendant and Appellant.

Case No.

10889

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## APPELLANT'S BRIEF

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### NATURE OF CASE

This is an action to determine the validity of that certain lease entered into by Phillip Conley, the appellant, doing business as the Hickory Pit, on the 2nd day of July, 1966, with Joy R. Berry and Miriam B. Berry, contract purchasers of the premises in question.

### DISPOSITION IN THE LOWER COURT

The Court granted the plaintiffs' Motion for a Summary Judgment, entered judgment forfeiting,

foreclosing and terminating all of the defendants' rights, title and interest in and to the premises including the leasehold interest of the appellant.

### **RELIEF SOUGHT ON APPEAL**

Defendant-appellant seeks a reversal of the judgment of the lower court, remanding the case back to the lower court for a trial on the issues of fact in dispute in this matter.

### **STATEMENT OF FACTS**

On the 20th day of October, 1965, respondents and defendants, Joy R. Berry and Miriam B. Berry, entered into a real estate contract covering the following described real property (R-4):

Commencing in the center of 48th South Street, 587.4 feet East and 280.5 feet South of the Northwest corner of Lot 1, Section 7, Township 2 South, Range 1 East, Salt Lake Base and Meridian, thence North 88° East 65.5 feet for the place of beginning of the tract of land to be described; thence North 88° East 185.3 feet to center of State Street; thence South 154.44 feet; thence West 184.64 feet; thence due North to place of beginning.

EXCEPTING THEREFROM that portion of the above described property that lies within the bounds of 4800 South Street and State Street, Salt Lake County, State of Utah.

The Berrys entered into a Lease Agreement on the 2nd day of July, 1966 with the Appellant, leasing that portion of the premises designated as 4816

South State Street, Murray, Utah, for a period of five years at a total rental of \$18,000.00, payable in advance at the rate of \$300.00 per month (R-27). The Appellant was also granted a right to renew the lease for an additional period of five years.

The Appellant, in reliance upon said Lease Agreement and verbal manifestations and representations made unto him by Respondents, as evidenced by the Appellant's Affidavit filed in response to Respondents' Motion for Summary Judgment (R-31), invested a large sum of money to improve the premises, both internally and externally. The evidence further indicated that Respondents had actual knowledge of the lease when it was entered into and made no objections to the occupation of the property by the Appellant in July of 1966. The Appellant has paid all rentals and is current in his obligation. On the 31st day of January, 1967, Appellant Conley received from Respondents a Notice to Pay or Quit the Premises. Immediately thereafter Conley delivered a certified check in the amount of \$600.00 as required in the Notice to Respondents, which was for the rent due and owing, which check was retained and accepted by Respondents (R-31).

This case was filed by Respondents on the 14th day of December, 1966 (R-31), and Appellant Conley was served on the 15th day of December, 1966. Right after service of the Complaint on Appellant he was led to believe he could remain on the premises (R-31). Suit was not based on any alleged default by Appellant, but rather the default of the contract pur-

chasers-lessors, under whose rights, the Respondents claimed, the Appellant had possession.

## **SUMMARY OF ARGUMENT**

### **POINT I**

**THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, AND IGNORED MATERIAL ISSUES OF FACT.**

Defendant, in answering Plaintiffs' Complaint, put the Plaintiffs to their proof on the allegations made by the Complaint filed by Plaintiffs, while denying other allegations. It is contended, by way of affirmative defense, that:

The defendant Conley had a valid existing lease dated from July 2, 1966 and continuing until July 2, 1971.

That there are the following facts which are in dispute:

(a) That a valid lease exists between the parties;

(b) That Respondents have ratified the lease by their acceptance of Conley on the property;

(c) That Appellant is a tenant under a lease and has a tenancy from year to year;

(d) That Respondents affirmatively have acted so as to make Appellant believe he should remain on the premises;

(e) That the suit was instituted based on no default of Appellant.

Should the above facts be found in favor of Appellant then as a matter of law, Appellant would be entitled to possession of the property and the terms of the lease would apply.

Appellant claims that while it is true that Respondents had authority to refuse him possession of the property under the terms of the real estate contract (R-4) when Appellant first went into possession, Respondents permitted Appellant to occupy the premises and are therefor estopped from denying validity of the lease.

Summary Judgment procedure is not a substitute for the trial of disputed issues of fact. (*Griffith v. Utah Power & Light Company*, C. D. 1955, 266 F. 2d 661). On a Motion for Summary Judgment the court cannot try issues of fact as we have present in this case. The court can only determine whether or not there are issues to be tried. (*Barron & Holtzoff*, § 1231, Vol. 3, p. 101.) The Utah Supreme Court has stated:

“We have heretofore ruled that Summary Judgment can properly be granted under Rule 56 (c) if the pleadings, depositions, admissions, stipulations, together with any other proper evidence show without dispute that the party is entitled to prevail.” (*North American Life Ins. Co. v. Bayou Country Club, Inc.*, et al., 16 U. 2d 417, 403 P. 2d 29.)

A Motion for Summary Judgment lies where there is no genuine issue as to any material fact. It necessarily follows that a formal denial and an



answer should not necessarily defeat such a motion as otherwise the rule can be rendered nugatory at will. Barron & Holtzoff states that on a Motion for Summary Judgment the court cannot try issues of fact but only determine whether or not there are issues to be tried. This procedure is well adapted to expose such sham, claims and defenses as may exist, but the Motion for Summary Judgment cannot be used to deprive a litigant of a proper trial of genuine issues of fact. Here there are material facts which are uncertain and they cannot be determined without a proper hearing. As of this date the Appellant has not had his day in court to present the facts which are most favorable to a disposition of this case. Rule 56 (c) of the Utah Rules of Civil Procedure is substantially like unto Rule 56 (c) of the Federal Rules of Civil Procedure. Barron & Holtzoff, Sec. 1234, Vol. 3, states the following rules:

“Grounds for Summary Judgment. Rule 56 (c) fixes the standard by which to determine whether a summary judgment should be granted. It provides that the judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The latter rule was announced by the Utah Supreme Court in the case of Dupler v. Yates, 10 U. 2d 251, 351 P.2d 624, and accepted by the 10th Circuit Court in Porter v. Jones, 176 F. 2d 87. In our case there is no question that certain facts, if found to be true, would

alter Respondents' position and strengthen the position of Appellant. Summary Judgment must be denied if there is a genuine issue as to a material fact. Such a judgment should be granted if there is no issue which calls for a trial.

Rule 56 is not merely directory but affects the substantive rights of the parties, and since it provides a somewhat drastic remedy it should be used with due respect for its purposes, and a cautious observance of its requirements in order that no person will be deprived of a trial of disputed factual issues. (Barron & Holtzoff, § 1231, Vol. 3, p. 103 and cases cited therein. *Holland v. Columbia Iron Mining Co.*, 4 U. 2d 303, 293 P. 2d 200.)

## CONCLUSION

It is clear from the pleadings and the affidavits on file (R-31) by Appellant and (R-44) by Respondents, that there are factual issues in this case which a jury should resolve. This court has ruled that summary judgment under Rule 56 of the Utah Rules of Civil Procedure was never intended or designed to eliminate a hearing where the pleadings and affidavits on file clearly show that there are issues of fact presented, and which must be proven. The record clearly shows that the defenses raised by Appellant are not mere sham, but a sincere dispute regarding the validity of the lease under which Appellant claims possession of the property. The disputes both to law and facts in this matter are many and material, and it should be for a jury to

determine the facts upon which the law will be applied and a judgment rendered for one or the other parties in this matter.

Respectfully submitted,

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